

Stress-Testing American Democracy: An Initial Assessment of the Health of our Democratic Institutions in the Trump Era

Delivered by Matthew Diller*

New York County Lawyers Association, Charles Evans Hughes Lecture,
February 9, 2021

Thank you, Jim and Judge Katzmman and many thanks to NYCLA for inviting me to share my thoughts at what is clearly a pivotal moment. I am going to speak tonight about a subject that is on all of our minds – the state of our democratic institutions and culture at this critical moment. To do so, I am going to begin by focusing on Charles Evans Hughes – it is after all the Hughes’ lecture that brings us all together tonight – his character and values hold important lessons for us today.

Charles Evans Hughes is a towering figure in American Law. Born in Glens Falls, New York in 1862 to a welsh immigrant preacher, he started his legal career at Chamberlain, Carter & Hornblower, becoming a named partner four years later in 1884. The firm, now known as Hughes, Hubbard and Reed remains one of our

* I am grateful to Fordham Law Students Eden Lichaw and Daniel Lutfy for their insights and research. I am also grateful to my faculty colleagues Professors John Feerick, Joseph Landau, Russell Pearce, and Jed Shugerman for their suggestions and comments on drafts of this lecture. All mistakes are my own.

nation's leading law firms and has sponsored NYCLA's Hughes lecture since its inception in 1948. Thank you for hosting us today.

Hughes' career in both private practice and public service was built on a reputation for independence and integrity. He was elected Governor of New York in 1906 and then appointed to the Supreme Court by President Taft. After serving as an associate justice for 6 years, he resigned to run for President against Woodrow Wilson. While he never made it to the White House, he did become the 8th President of NYCLA -- a post he left when returned to public service as Secretary of State. After another stint in private practice, he returned to government, first as Solicitor General, and then from 1930 to 1941 as Chief Justice of the United States.

As chief Justice, Hughes was a swing vote – he was not firmly in either the progressive camp or the conservative block. He waged a behind the scenes fight to stop Roosevelt's court packing plan – an issue which he saw as fundamental to the independence and integrity of the judicial branch.

From start to finish, Hughes' career was based on a few bedrock values – as the child of a pastor, service was an imperative to him. This commitment was married to a firm foundation in integrity and fair dealing. He was outspoken in decrying racial injustice – he was the keynote speaker at the National Conference

Against Lynching in 1919 and as Chief Justice, he ended segregation in the Supreme Court cafeteria. He personified the great citizen-lawyer who spent his life working to build and sustain our profession, our legal institutions and our American democracy.

This is an important moment to think about Hughes and the values that he stood for and fought for. It is important because these values are being challenged on a daily basis and much of what we have assumed to be foundational principles of American democracy are now at risk. Hughes' values appear today not as stodgy appeals to rectitude, but as a call to action. What would he say, looking at the present state of the nation?

We are at an inflection point – a new administration has just taken office, drawing to a close the four years of a presidential administration unlike any before. It is far too early to draw definitive conclusions about the Trump experience – historians will do so for years to come – and let's face it – we all have a lot to process. But I want to offer a number of observations about what we have learned about American democracy at this point in our history. I won't dwell on the seizure of the Capitol and impeachment, but I do want to underscore how close we came to national tragedy and disaster. Imagine if the rioters had seized the Speaker of the House or the Vice president? Imagine if the bombs that

had been planted had gone off? Five deaths were tragic, but it is important to remember we were within an inch of a larger bloodbath and massacre. Pulling back from January 6th, I will focus on the daily erosion of our norms and institutions over the past four years that paved the way for the insurrection.

I will start by harkening back to another lecture – one that represents a seminal turning point in how we think about the nature of law and the legal system. In 1897, Hughes' friend and later colleague on the Court, Oliver Wendell Holmes delivered his classic lecture, *The Path of the Law* at Harvard law School. In it, Holmes brought to the legal field, the powerful insights of the pragmatists. He rejected the idea that law is a coherent set of principles knit together as an intellectual whole. Rather than viewing law as a system of logic, Holmes posited that law is simply a series of predictions – statements about the use of governmental authority that will flow as a consequence of any particular action or course of conduct.

According to Holmes, legal rights and duties are meaningless concepts without consideration of what happens when rights are violated or duties breached – in fact, it is these consequences that define the law. In Holmes' view, to truly understand law, one must set aside moral systems and focus on the material practical consequences. To do so, Holmes employed the construct of the

“bad man” – the person who is free of moral conscience or constraint, whose actions are solely determined by what he can get away with. “Law” consists of the consequences the bad man would suffer in undertaking proscribed activity.

Holmes did not argue that the conduct of the “bad man” is morally acceptable – indeed, that is why he is “bad.” He used the idea of the “bad man” to clarify that which we should consider “law,” as opposed to religious, moral and cultural values and norms. It is easy to take issue with Holmes’ “bad man” framework, and many have. There is a complex relationship between law and morality. Law does establish and express values. It does shape thinking and establish norms -- the vast majority of people follow the law even when there are no identifiable negative consequences for violating it. At the same time, the power of Holmes’ view is undeniable and it laid the ground work for legal realism and the progressives’ approach to law. It was critical to breaking through abstract and esoteric notions of law and grounding law in practical realities.

Holmes was principally concerned with common law systems – he sought to understand our systems of tort and contract law. But Holmes’ insights are valuable in considering the processes, institutions and systems that taken together make up our system of democratic governance. American democracy is a bundle of laws, cultural norms, values, tradition and history all operating under

a framework established by the Constitution. It is a rich mixture of “hard law” and “soft law.” What have we learned over the past four years about this mixture? How effective is it defining the role and place of the presidency in our system of government?

We learned a lot. Donald Trump is our first President who from start to finish amounted to a Holmesian ‘Bad man’ in the oval office. Others, most importantly Richard Nixon, had attributes of the Holmesian bad man, but no one has so thoroughly disregarded the substrate of laws, values and understandings about democracy and our institutions. While Nixon attempted to conceal his abuse of the office of the presidency – an implicit acknowledgement of awareness of wrongdoing -- Trump broadcast his contempt for the norms and traditions of the office from the start to finish of his presidency

President Trump’s belief in himself and his mission brooked no space for respectful disagreement, deference to institutions, processes or traditions. Ever self-interested, he also did not believe that others might act in ways that are public regarding. For example, in a presidential debate, President Trump said that absent detention, only those with the “lowest IQ” would show up for court proceedings. In his framework, everyone is always narrowly self-interested -- a brutal Hobbesian world. The only constraints he saw on his authority were the

literal limits on what he could get away with – truly, a Holmesian bad man, bounded only by the extent to which he would suffer adverse material consequences when he transgressed boundaries.

As we close the Trump presidency, it is vital that we examine how our democratic institutions responded to the challenges posed by the acid test of a Holmsean “bad man” as president. Although there were some points of light, most of what the past four years revealed is deeply disturbing. I will touch on a few aspects that made clear that a Holmesian bad man in the White House could abuse power with impunity. These may not be the things that strike many people as the most egregious aspects of the Trump era, but they are important in their corrosive effect on the laws, norms and values that define the office of the president. I will not focus principally on the relationship between the presidency and the Congress – the main form of political checks and balances -- because that relationship is designed to ebb and flow depending on the relative political strengths of the key actors. Rather, I will focus on four features intended to prevent a powerful president from subverting our processes and institutions: First, the separation of prosecution from politics; second, the web of laws and traditions intended to prevent corruption, third, the requirement of senate

confirmation for officers of the United States, fourth, and finally, the performance of the judiciary in constraining a lawless administration.

First, the separation of politics from prosecution is a core principle in our democracy – political leaders abuse their power when they manipulate the authority to excuse or accuse individuals of crimes to further their own personal ends. This kind abuse would be included in any primer on despotism – it is Tyranny 101. We need only look to the treatment of Alexei Navalny to see this. Our means of ensuring the separation of politics from criminal prosecution is largely based on culture and tradition – constraints that proved inadequate to constraining a Holmesean “bad man” in the White House. President Trump was able to protect allies and supporters from the full weight of prosecution. Nothing illustrates this better than the case of Roger Stone where the Justice Department retracted its recommendation of a seven to nine year sentence following a presidential twitter storm characterizing the recommendation as “horrendous.” The next day all four career prosecutors withdrew from the case as the Department retracted its recommendation. Another example is the Department of Justice’s motion to dismiss charges against former national security advisor Michael Flynn after a guilty plea had been entered. In this case as well, President Trump had made public statements urging that the case be dropped. Here too,

none of the prosecutors handling the case would sign on to the request. The withdrawal of DOJ line attorneys shows the power of professional standards and ethics as a bulwark against presidential abuse, but it shows their limits as well. The resignations were ineffective in changing outcomes. Finally, the discharge of the U.S. Attorney for the Southern District of New York, had the indicia of an attempt to replace an independent prosecutor with a more compliant one. Of course, all this was a prelude to President Trump's rampant use of the pardon power to reward friends and allies. The consequence is a license for presidential allies and underlings to break the law with impunity – a major threat to our democracy.

President Trump also worked hard to harness the power of political prosecution to punish and neutralize his adversaries. Here, the President's efforts were less successful, and our system proved resilient. As much as President Trump called for the prosecution of Hilary Clinton or Joe Biden or those involved in exposing Russian interference in the 2016 election, such as CIA director John Brennan and FBI agents Peter Strzok and Lisa Page, no indictments have been handed down. Indeed, the Justice Department reportedly sought, but was unable to obtain an indictment of deputy FBI Director Andrew McCabe. Much to

President Trump's frustration, the investigation led by John Durham did not yield indictments prior to the election.

The threat to prosecute political enemies, however, is a powerful weapon in itself, even if indictments never issue. The President's threats and actions to carry them out are major breaches of the norms and traditions of American democracy. If President Trump's behavior in this realm becomes normalized, our system is in grave peril.

President Trump could meddle with the machinery of criminal prosecution because we have no firm constraints in place that prevent a president from doing so. While some theorized that his actions amount to obstruction of justice, there was no real threat of such a prosecution, in part, due to the longstanding Department of Justice view that a sitting president cannot be indicted and in part because of the challenges of making out an obstruction of justice case to begin with.

Second, many of the laws intended to ensure ethical conduct by public officials were exposed to be ineffective in constraining a president who did not share the norms and values that the laws reflect -- including rules intended to protect the use of public office for private financial or political ends and the

system of watchdogs established by placement of inspectors general distributed throughout federal agencies.

For example, senior officials in the Trump administration disregarded both the letter and spirit of the Hatch Act with impunity. With the exception of the President and Vice President, the Hatch Act prohibits federal employees from using their positions for partisan political purposes. Clearly, there are gray areas, as many steps taken by officials have some element of political calculation, but the administration behaved generally as if the Act did not exist. The watchdog group, Citizens for Responsibility and Ethics in Washington (CREW) has reported dozens of Hatch Act violations by senior officials – from using twitter accounts for both official business and disparaging political attacks, to the use of public resources for travel to support congressional candidates during the elections, to Ivanka Trump’s endorsement of Goya products to reward its CEO, a Trump ally. The Office of Special Counsel charged with enforcing the Hatch Act issued a detailed report finding that KellyAnne Conway had violated the Act so many times that the failure to terminate her eroded the rule of law. The same could be said of other senior officials.

Perhaps the culmination of this pattern was the Republican convention in August – a campaign event held at the White House that included the granting of

a presidential pardon, a naturalization ceremony and a speech by the secretary of state delivered from a foreign capitol. To illustrate how far we have come, when Vice President Gore made fundraising calls from his Whitehouse office, Attorney General Janet Reno launched a review of his conduct.

The Ethics in Government Act, one of the cornerstones of the post-Watergate reforms, also proved not up to the task of constraining a Holmesian “bad man” as president. Most glaringly, the Act exempts the President from its proscription on conflicts of interest. However, for 40 years, presidents have complied voluntarily – establishing a tradition that has become part of our democratic safeguards. Indeed, as a candidate, Donald Trump vowed to build a “firewall” between his presidency and his businesses. The reality was far different. He placed his assets in a revocable trust run by his sons for his own benefit – as one law professor put it, “the illusory window dressing of a trust.”

He used the office of President to benefit his own businesses on a daily basis. Along with his aides and security detail, he visited his own businesses hundreds of times. He praised and promoted them frequently in official statements. He held events with foreign leaders at his own properties and urged that major international conferences, like the G7, be held at Trump resorts. Paying customers at Trump resorts like Mar-a-Lago received direct access to the

President. Foreign governments and lobby groups held a stream of events at the Trump International Hotel in Washington. All of these activities involved spending money that directly benefited the President financially.

Much attention has been given to President Trump's disregard for the tradition of disclosure of presidential tax returns, another norm that has served as a safeguard against corruption and self-dealing. Less attention has been given to the White House's disregard of the Presidential Records Act which has no meaningful enforcement mechanism. The Act mandates preservation of all presidential documents. It has been reported that memos were routinely ripped up, thus destroying potential evidence of wrongdoing. The Act was evaded by the failure to document any of the content of the President's five meetings with Vladimir Putin during the first two years of his presidency. All of this is ironic in view of President Trump's efforts to prosecute Hilary Clinton for failure to preserve her emails when she was Secretary of State.

In sum, the Trump administration made no distinction between legitimate advantages that come with incumbency and illegitimate and even illegal ones. It suffered no consequences for this disregard.

Hand in hand with this disregard for laws and traditions designed to prevent corruption, mechanisms for self-policing within the executive branch

were weakened and disregarded. Whistleblowers were outed and punished, inspectors general were purged. Civil servants' careers were ruined. In April and May 2020, President Trump fired 5 inspector generals. The President was explicit in firing Michael Atkinson, the IG for the intelligence community because he had notified Congress of the whistleblower complaint about the President's call with the President Zelensky of the Ukraine. Christi Grimm, the principal deputy IG at the Department of Health and Human Services was terminated after issuing a report criticizing the Administration's preparedness for and response to the pandemic. Steve Linick, the State Department IG was terminated at the request of Mike Pompeo, whom he was in the process of investigating.

Congress established a system of inspectors general in the wake of Watergate as a means of preventing and exposing waste, fraud and abuse. Although their tenure is not secured by statute, Congress clearly intended IGs to be independent and insulated from politics. It required Congressional notification and a statement of reasons when an IG is removed. When both Presidents Reagan and the first President Bush tried to replace IGs wholesale, the ensuing outcry led them to back down. When President Obama removed a single IG, both parties in Congress demanded a fuller explanation. When President Trump purged IGs – often in retaliation for their findings or pursuit of investigations, Democrats in

Congress objected, joined by only a few Republicans. The matter received scant attention. Essentially, President Trump paid no penalty for these actions.

I understand that many of these legal and cultural restrictions may appear to some as bureaucratic red tape, and technical requirements. Some might argue that they are illegitimate shackles on the presidency. However, they are properly understood as key parts of the web of laws, traditions and understandings that enable us to hold presidents accountable and protect against corruption and self-dealing.

Third, the President eroded the constitutional requirement of Senate confirmation for officers of the United States by evading the Federal Vacancies Reform Act, which limits who can serve without confirmation as the temporary occupant of a position that requires Senate confirmation and for how long. In 2019 he stated that he “sort of like[d]” having acting officials because it gave him “more flexibility” – meaning they would be more beholden to him rather than allies in Congress. For example, the Department of Homeland Security was headed by “acting” secretaries from April 2019 until the end of the administration - almost half the Trump presidency, as were many of the top positions within the Department. A report by the Government Accountability Office in August 2020 found the senior leadership of the Department to be without lawful authority, a

view that was adopted by two federal courts after the November election. In the waning days of the Administration, Acting Secretary Chad Wolf resigned, yet no new head of homeland security was nominated during the Trump presidency. It is probably not a coincidence, that agency whistleblowers charged the Acting Secretary with attempting to suppress intelligence on both Russian interference with the 2016 election and on the threat posed by white supremacists.

One of the most egregious uses of acting department heads was in the Department of Justice in a likely effort to limit the Mueller investigation. President Trump forced out Jeff Sessions, whose recusal had opened the door for Rod Rosenstein to appoint Robert Mueller special counsel. President Trump replaced Sessions with Matthew Whitaker, an official who had not been confirmed by the Senate for any office and despite a clear statutory order of succession within the Department of Justice. It seems pretty clear President Trump was looking for an Acting Attorney General who would reign in or end the Mueller investigation. Because President Trump soon found William Barr for this role, Whitaker will remain a footnote.

Fourth, the past four years revealed major flaws in the ability or willingness of the Article III courts to check abuse of executive power. To be clear, the courts carried out their role in thousands of cases seeking judicial review of policies and

actions of the Trump Administration. And for that, I am grateful. But they also failed to resolve key issues where their oversight was critical. One need not get into the issue of whether particular interpretations of law were correct to see these failures – On key issues the courts declined to rule or were so slow in reaching final resolutions that the administration was able to run out the clock.

The litigation over funding for the border wall is a prime example of the courts' failure to protect our constitutional order. In February 2019, when Congress refused to fund the construction of the Border wall, the Administration declared an "unforeseen military emergency" and commenced construction anyway. To call the government's position on the merits weak is an understatement and it was rejected by both the district court and 9th circuit and eventually the D.C. Circuit, all of which found the conduct to violate separation of powers. In July 2019, the Supreme Court questioned the plaintiffs' standing and, on that basis, stayed the relief. When the presidential term ran out, the Court had still not ruled on either the standing issue or the merits, and the challenged construction continued through the whole period, as billions were spent for purposes Congress had specifically rejected.

The lawsuits challenging President Trump's putative violation of the emoluments clause were filed in January 2017, right after his inauguration. When

he left office four years later, there was no resolution of either the merits or plaintiffs' standing. Instead, the cases were dismissed as moot shortly after President Trump's term ended. Similarly, President Trump left office without having to comply with congressional subpoenas, as the courts were unable to render final decisions within the term of his presidency.

In sum, too many of our safeguards were unenforceable – because they were based in custom and tradition, or were rooted in laws with weak, ineffectual enforcement mechanisms, or because judicial remedies were simply not forthcoming in a timely way. The willingness of our society to tolerate these transgressions of laws was damaging in important ways – it undermined the notion that the president is bound by law and by the norms established through tradition. It eroded the expectation of compliance and normalized conduct that was unacceptable. Even those who called the President out on these transgressions were worn down by a constant barrage wrongdoing. This normalization of the abnormal, built up to the President's refusal to acknowledge his defeat even after states had certified electors and of course, to the seizure of the Capitol on January 6th, as his supporters felt free to violate laws in the pursuit of their cause.

I want to offer two take aways from this discussion. First, we need to do a better job building our traditions and norms into concrete obligations – requirements that would have an impact on even a Holmesian “bad man.” This, of course, was a major project coming out of Watergate when laws like the Ethics in Government Act were passed. We know now, that this system of checks is simply not up to the task. Over the years many proposals have been made to provide stronger and more effective protections against presidential abuse of power. In the wake of the Trump administration, these proposals, and other new ideas deserve attention. I commend the series of reports by Fordham Law School’s Democracy Clinic, led by Dean John Feerick and John Rogan as a starting place. Important work has also been done by the Brennan Center for Justice’s Taskforce for the Rule of Law and Democracy and CREW – The Center for Responsibility and Ethics in Washington. I cannot go through all of the recommendations in this lecture and each of the areas addressed deserves careful study, but I will mention a few. The Fordham Democracy Clinic recommends enactment of legislation prohibiting presidential interference in individual investigations and prosecutions, except when core presidential functions are implicated. It further recommends that if the White House violates

this proscription, individual prosecutors have a duty to disregard the interference, rather than resign from the representation.

Other recommendations offered by these reports focus on strengthening protections against the use of the presidency for private gain, including making the president, vice president and White House staff subject to proscriptions on conflicts of interest, requiring disclosure of tax returns, modernization of financial disclosures and reform of the Office of Government Ethics to add enforcement and investigatory powers. Inspector generals should be given more security, as some have proposed.

The Democracy Clinic also offers proposals concerning pardons, special counsel investigations, and public officials' use of social media. These steps would make it more difficult for another "bad man" to elide protections that are vital to our democracy. They bear careful scrutiny.

I note that these proposals are subject to an overarching objection. Some of the weaknesses in our system of oversight flow from the erroneous view that the President's power over the executive branch cannot be limited. This view has been gaining ascendance on the Supreme Court. For example, the Supreme Court's decision last term in *Seila Law v. Consumer Finance Protection Bureau* found the structure of the CFPB to violate Article II of the Constitution because it

undermined presidential authority over important executive functions.

Proponents of this strong view of executive authority argue that the principal ways presidents are held to account is through the ballot or through impeachment. I am not an expert on the history and scope of Article II, but I will note that the *CFPB* decision does not go this far. It distinguishes the framework of the Ethics in Government Act from the scheme at issue in *CFPB*. The so called “unitary executive” theory is not the law of the land.

But more generally, the experience of the past four years is Exhibit A in opposition to the case for unfettered presidential power. It demonstrates the need for an approach to separation of powers based on balance and practicality, rather than formal categories. As far as the ballot – we elect a president every four years, who is subject to laws, rather than a time limited despot who is not. Critically, the threat of being voted out of office has no traction at all on second term presidents. Impeachment is a draconian blunt tool that results in removal or exoneration, but nothing in between. As we have seen, failure to convict can easily be construed as vindication, rather than a reflection of the heavy burden it takes to remove a president.

The second larger take away from the Trump experience is that it takes more than law in the Holmesian sense to preserve our democracy. It takes an

understanding and appreciation of the tradition, norms and culture of democracy and a commitment by each of us to play our part in its operation – a commitment that Charles Evans Hughes stood for and lived. The only way to really check a Holmesian “bad man” in the White House, is through the actions of good people in key roles – people who look to the shared understandings of their public duties and the values that lie behind them. Our republic could not withstand Holmesian bad-faith shot through at every level. Because those responsible for enforcing constraints would themselves have no ethos or moral grounding, there would be no assurance that legal constraints would be backed up by predictable adverse consequences. This reality can be seen in the failure of so many democracies which have the laws and forms of democratic self governance, but none of the substance.

Our culture of democracy is clearly in danger. Millions of Americans still believe the election was somehow stolen, despite a complete lack of evidence to the contrary. This belief was fueled by elected officials who should have known better – who undermined public trust in democratic processes.

Eighteen State Attorneys General filed a frivolous lawsuit in the Supreme Court to stop certification – lending the weight of their offices to falsehoods that threatened to undermine our democracy. 7 senators and 139 members of the

House of Representatives baselessly opposed certification of the electors. The fact that they felt free to abuse their offices in this way is a red flag that the culture of our democracy is in danger. Seeing lawyers on TV these past two months trading in baseless falsehoods about the election is a disgrace to our profession.

When the rioters broke through the doors and pillaged the Capitol, our society recoiled in a visceral way. That point, however, should never have been reached. Americans should have been repelled by the self-dealing and corruption of the administration, by the evasion and disregard for laws and traditions. Leaders of both political parties should have made it clear from the start that it was unacceptable. Had they done so, the past two months would have been very different. The fact that as a society we failed to expect, demand and require these standards is itself a major warning sign. Our tolerance of the Administration's transgressions was corrosive – it sent a message to President Trump's supporters that the administration was not bound by our regular set of rules, and that they were not either.

The task then, is to sustain and nurture our culture of democracy. In this project, the legal profession can and must play a critical role. As lawyers, we have a special relationship with the tradition and culture of American democracy. We

benefit from it and earn our livelihood from it. Our privileged position comes with responsibilities – to educate and communicate the importance of this richer and fuller notion of our democratic system. As Charles Evans Hughes said in delivering the commencement speech to the first graduates of Fordham Law School in June 1908, “it is not too much to say, the success of American government depends on the strength of the professional ideals of the bar.” My colleague Russ Pearce, put it more succinctly – lawyers have a duty to democracy.

The events of the past four years reveal that we have not done enough, and we have not been effective. We must look within and ask hard questions about how we in the legal profession can better educate attorneys who will work to uphold and improve democratic institutions, rather than tear them down.

In addition to looking hard within the legal profession, we also need to reach beyond ourselves. Projects like the Second Circuit’s initiative *Justice For All: Courts and the Community* – which opens up our courthouses so children can learn are a superb starting point. This does not simply mean teaching about the three branches of government. It means helping others cultivate habits of discourse that foster critical thinking and reasoned discussion – qualities that are essential to democratic governance.

And as a law school dean, I know that we in the academy have a mission to explain our system to the public, to use our expertise to improve it and to convey to the next generation of lawyers an understanding of their own role upholding the values and culture of democracy.

Finally, nurturing the culture of our democracy does not mean accepting things as they are. Our democracy is incomplete, flawed – a work in progress. We have a responsibility to rid our institutions of injustice, so that they are worthy of trust and respect. Racial inequality is inconsistent with the fundamental premises of democracy and undermines the legitimacy of our institutions. We fall far short in access to our justice system.

I am under no illusion that these are simple or easy tasks. The erosion of faith in our public institutions stretches back 50 years – from the disillusionment of the Vietnam war and Watergate era to the sustained attack on the efficacy of the federal government since the presidency of Ronald Reagan. The goal is not a return to a mythical past, but rather a way forward which addresses the injustices in our society and draws on the capacity of our collective will – acting through our public institutions -- to correct these injustices and accomplish our common ends.

It is important to recognize that despite the erosion of the culture of our democracy, it is not without resilience. We have seen its strength over the past

two months during this traumatic transfer of power. We have seen it through the actions of many public officials who carried out their responsibilities while under great pressure. When President Trump and other demagogues spread falsehoods about the election, and Republican congressional leaders capitulated to political pressure, the thousands of men and women charged with actually implementing our electoral system faithfully carried out their offices. Supervisors of elections across the country faithfully managed recounts and certified results in the midst of a pandemic. State legislators declined to interfere with the selection of electors. They did so despite intense pressure from the President, their own party leaders and in some instances, in spite of threats of violence and death. They did so in clear and unequivocal terms in state after state across the country. Just to list a few examples – Brad Raffensperger, the Georgia Secretary of State not only stood by the election results, but called out his fellow Republicans for baselessly undermining them. In voting to certify the election results, Aaron van Langevelde, a Republican member of the Michigan Board of State Canvassers stated: "This board must respect the authority entrusted to it and follow the law as written. We must not attempt to exercise power we simply don't have." -- a view that would seem simple and incontestable, and yet took tremendous courage to state and act on. At the federal level, both the Department of

Homeland Security and the Justice Department were forthright in rejecting claims of widespread fraud and abuse in the November election.

The backstop in our system is the judiciary. While the judiciary failed to produce timely resolutions of some key questions during the Trump years, both the federal and state courts rose to the challenge of protecting the results of the election, adhering to settled law and demanding evidence to support claims of fraud and misfeasance. Federal District Judge Matthew Brann and Third Circuit Judge Stephanos Bibas, both Republicans, forcefully rejected meritless claims advanced by Trump supporters. Courts in Nevada, Georgia, Wisconsin and Pennsylvania reached similar results. In total, the courts rejected more than 60 law suits challenging results in the presidential election. When faced with the most basic challenge of all to what it means to be a democracy, our system held because of the fortitude of these ground level officials who had specific jobs in implementing the election and performed them in good faith.

Perhaps, these officials held firm because of the threatened consequences if they did not. But in many instances they would have been hailed as heroes by the President and his supporters. Had political officials caved into pressure, the courts would have been left as the sole upholder of our democratic system – a scary and tenuous place to be. More likely, what held judges and officials in line

was the belief in their mission and role coupled with an absence of any real model or precedent for how American democracy survives if they abandoned their obligations. Officials like Raffensperger embraced their public responsibility to administer fair elections and report accurate results. Indeed, it is apparent they are paying a price for it as the Republican party in key states is ostracizing and sanctioning the officials who stood up for our democratic process. Last month, Van Langevelde lost his position on the Board of Canvassers. Challengers are lining up to unseat Raffensperger. We owe our republic to the work of thousands of public servants to faithfully executed their offices in the lead up to and in the wake of the election.

I have striven to emphasize today that our system depends not simply on the “big stuff” like checks and balances or *Marbury v. Madison*, but on a web of smaller pieces that are vital to the texture of our democracy. The wanton disregard of statutes like the Ethics in Government Act, the Hatch Act, the Federal Vacancies Reform Act and so much more, coupled with disregard for informal traditions and understandings around what it means to be President proved to be dangerous warning signs that should have spurred greater response. I think that if Charles Evans Hughes were with us today, he would not shrink from the task ahead – he lived through a pandemic, the great depression, the rise of fascism

and two world wars. He would recognize our ability to work together on the great project of American democracy.